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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KLEINSCHMIDT INC., an Illinois corporation; BANK OF WAUKEGAN, as Trustee under Trust Agreement dated Nov. 20, 1986 and known as Trust No. 1898; and HARRY S. GAPLES,

Petitioners,

v.

THE COUNTY OF COOK, a body corporate and politic of the State of Illinois; THE COUNTY OF LAKE, a body corporate and politic of the State of Illinois; AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Trustee under Trust Agreement dated Aug. 31, 1983 and known as Trust No. 59087; and CORPORATE 500 CENTRE PHASE 1, an Illinois limited partnership,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does it violate the takings clause of the Fifth Amendment to the Constitution of the United States for a state to purchase private property under the right of eminent domain, and then to convey that property to another private party for private use?

2. Does the Fourteenth Amendment to the Constitution of the United States prohibit the transfer of private property acquired by a governmental agency for highway use under the right of eminent domain to another private party for private use?

3. Where private property is acquired by a governmental body under threat of condemnation, is a condemnation lawsuit to judgment necessary to invoke the rule that the Fifth and Fourteenth Amendments to the Constitution of The United States prohibit the taking of private property from one person and subsequent conveyance to another person for private use?

4. Does the threat of condemnation of private property for public use by a governmental body coupled with a deed conveying title invoke the proscription of the Fifth and Fourteenth Amendments to the Constitution of The United States that private property may be taken only for public use?

PARTIES TO THE PROCEEDING

I. Petitioners (Plaintiffs below)

1. KLEINSCHMIDT INC., an Illinois corporation

2. BANK OF WAUKEGAN as Trustee under Trust Agreement dated Nov. 20, 1986 and known as Trust No. 1898

3. HARRY S. GAPLES

II. Respondents (Defendants below)

1. THE COUNTY OF COOK, a body corporate and politic of the State of Illinois;

2. THE COUNTY OF, a body corporate and politic of the State of Illinois;

3. AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO as Trustee under Trust Agreement dated 8/31/83 and known as Trust No. 59087;

4. CORPORATE 500 CENTRE PHASE 1, an Illinois Limited Partnership

III. Parent Companies and subsidiaries

1. Kleinschmidt, Inc. is a closely held Illinois corporation of which Harry Gaples is the principle shareholder, with no parent corporations and no subsidiary corporations.

2. Bank of Waukegan is a party only because it holds title under an Illinois naked land trust of which Kleinschmidt Inc. and Harry Gaples are

beneficial owners, and no parent subsidiary corporations are required to be disclosed under Rule 29.6

3. American National Bank and Trust Company is a party only because it holds title under an Illinois naked land trust of which Corporate 500 Centre Phase I is beneficial owner and no parent or subsidiary corporations are required to be disclosed under Rule 29.6.

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OPINIONS BELOW AND BASIS FOR JURISDICTION

(1) A judgment of the Appellate Court of Illinois, Second District, was entered on March 19, 1997, affirming a decision of the Circuit Court of Lake County, Illinois, granting defendants' motion for summary judgment and thereby denying injunctive relief sought by plaintiffs to prevent conveyance of land acquired by deed from plaintiffs for a public use under threat of condemnation from being conveyed to a private party. The sole ground for the decision was that since the property was acquired by deed and no condemnation suit was filed, the protection of the Fifth Amendment to the Constitution of The United States that private property may be taken only for a public use did not apply. (App. A, p. 1)

(2) A timely Petition for Rehearing in the Appellate Court of Illinois, Second District, was denied on May 8, 1997. A timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on October 1, 1997. (App. D., p 32)

(3) Jurisdiction of this Court is based 28 USCS Sec. 1257, in that a final judgment of the Supreme Court of Illinois by way of denial of leave to appeal from a judgment of the Appellate Court of Illinois has been entered, wherein the right under the Constitution of the

United States of a person whose private property is taken under threat of condemnation to have that property used only for public purposes has been abridged.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Constitution of the United States, Fifth Amendment ". . . nor shall any person be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

(2) Constitution of the United States, Fourteenth Amendment, Section 1 ". . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) Statutes of Illinois, 735 ILCS 5/7-102 "Where the right to take private property for public use, without owner's consent, or the right to construct or maintain any public road . . . or improvement, or which may damage property not actually taken, has been . . . conferred by . . . law . . . upon any . . . public body . . . and the compensation . . . cannot be agreed upon, . . . the party authorized to take . . . may apply to the circuit court . . . by filing . . . a complaint . . . praying such court to cause the compensation . . . to be assessed."

(4) Statutes of Illinois, 605 ILCS 5/5-801 "Any county, in its name, may acquire the fee simple title, or such lesser interest as may be desired, to any lands, rights or other property necessary for the construction, maintenance or operation of any county highway, township

road or district road within the county or necessary for the locating, relocating, widening, altering, extending or straightening thereof, by purchase or gift or, if the compensation or damages cannot be agreed upon, by the exercise of the right of eminent domain under the eminent domain laws of this State. The county shall not be required to furnish bond in any eminent domain proceeding. When, in the judgment of the county, it is more practical and economical to acquire the fee title to inaccessible remnants of tracts of land from which rights-of-way are being acquired than to pay for damages to property not taken, the county may do so by purchase but not by eminent domain proceedings."

STATEMENT OF THE CASE

Kleinschmidt Inc. is a computer processing and service business located in an industrial building which fronted behind a wide expanse of lawn on the north side of Lake Cook Road in Lake County, Illinois. Lake Cook Road divides Lake County and Cook County. In 1985, defendants Cook County and Lake County determined to depress Lake Cook Road under a railroad underpass to the west of plaintiffs' property. At that time, Kleinschimdt, Inc. was a subsidiary of SCM Corporation, and Gaples was its president. Later, Gaples bought the business and property from SCM, and at all relevant times owned the stock of Kleinschimdt Inc. and the beneficial interest in the land title to which is held under an Illinois land trust. Plaintiffs are collectively referred to hereafter as Gaples.

The property of defendants American National Bank as Trustee and Corporate Centre 500 Phase I, collectively

referred to as Corporate 500, lies immediately west of Gaples' property and between it and the railroad tracks. Depression of Lake Cook Road for the underpass would prevent direct access from Lake Cook Road to the property of Corporate 500.

Cook County acted as project land acquisition authority, and is vested with the power to acquire land for highway purposes by eminent domain. (605 ILCS 5/5-801) Cook County determined that the front 276 feet of plaintiffs' property would need to be acquired to provide an access road from Lake Cook Road to the property of Corporate 500, and approached plaintiffs, and sought purchase of the land. (C-798, 799)

Gaples was opposed to the location of the access road on Kleinschmidt property, and Kleinschmidt refused to sell the property to Cook County. (C-798, 799, 846, 801, 1182-1183) This opposition continued and Gaples repeatedly refused permission to Cook county for surveyors to enter upon his property (C-846) In September, 1986, Gaples even called police to eject Cook County surveyors. (C-895)

Corporate 500 wrote to Cook County on January 18, 1986, offering to exchange certain easements over its land which Cook County required for highway construction in exchange for a portion of the land to be acquired from Gaples in order to landscape the new access road. (C-857, Pl. Ex. 7) Corporate 500 then sought to buy the entire Kleinschmidt property, then a division of SCM, but Gaples, its then president, refused to sell. (C-888, Pl. Ex. 17)

In October, 1986, Gaples finally relented and allowed the surveyors on his property, and acquisition plats were

prepared, depicting a proposed curvilinear road on the property proposed to be taken from Gaples. (C-902, 909) On July 3, 1989, Cook County passed an ordinance determining that the front 276 feet of the Kleinschmidt tract, along with certain other tracts, be taken by condemnation under the eminent domain statute if compensation could not be agreed upon. (C-903, 925) Cook County then had the property appraised, and a hired a land acquisition agent to commence negotiations with Gaples. (C-900, 907) Gaples still refused to sell, and proposed other alternatives. (C-913, 919, 1208) Cook County repeatedly threatened to file a condemnation suit if plaintiffs did not sell. (C-866,1191) During the negotiations, Cook County made specific reference to a "condemnation option" (C-956) which it explained to mean that if the owner did not wish to sell or if a price could not be agreed upon, a condemnation suit would be started. (C-814) A formal and stylized written pre-condemnation offer was presented to Gaples by the county negotiator (C-958), and he was presented with a brochure describing Illinois Highways and Eminent Domain. (C-826) After further negotiations and threats of condemnation, Gaples relented and agreed to sell the front portion of the Kleinschmidt tract to Cook County for $600,000.00. (C-976) Gaples testified that he would not have sold to Cook County except for the threat of condemnation. (C-805-807)

No condemnation action was filed. Since the property was located in Lake County, title was conveyed to Lake County by Trustee's Deed in December, 1989, which was stated by Cook County in accompanying tax documents to be "in lieu of condemnation." (C-1049) Only a portion of the land was proposed to be used for actual pavement or roadway.

No issue has been raised in these proceedings concerning the amount of compensation paid by Cook County for the property, and none is presented here.

Construction of the project was delayed, and in 1994 while land acquisition for the project was still in progress, Cook County was negotiating with Corporate 500, which was claiming substantial damage to the remainder. (C-792-793) On July 17, 1994, unbeknowns to Gaples, Cook County entered into a settlement contract with Corporate 500. (C-29) Under that contract, Corporate 500 wold convey to Cook County the land and easements needed for construction of the underpass for a stated consideration, and would waive its damage to the remainder claim. (C-1017, Pl. Ex. 45) In return, Cook County was to convey to Corporate 500 the underlying fee title of the land which Gaples had sold to Cook County under threat of condemnation. (C-29, 1021) Under the terms of that contract, Cook County was to build the roadway on the property, and before conveyance to Corporate 500, the land acquired from Gaples was to be impressed with an easement for the actual paved portion of the roadway. Corporate 500 was to obtain fee simple title to the land, subject only to the easement for the paved roadway. (C-29)

Under the contract and proposed conveyance, Corporate 500 will own the fee title to the land, over under and through which pass electric and telephone utility lines vital to the operation of the business of Kleinschmidt. Although the contract to convey was executory, Corporate 500 sought Village approval to install occlusive landscaping on the property to be conveyed for the stated purpose of blocking view of plaintiffs building

from Lake Cook Road and the new access driveway. (C-1017, 1236-1239)

When plaintiffs learned of the application to the Village for the occlusive landscaping, they filed a verified complaint in the Circuit Court of Lake County, naming Cook County, Lake County and Corporate 500 as defendants, alleging that the conveyance made by plaintiffs to Cook County was under threat of condemnation, and thus was a "taking" of property under the Constitution of The United States and of the State of Illinois, invoking the constitutional protection that private property so taken be devoted only to a public use. (Complaint, Appendix C, Par. 25, App. p. 27) The complaint specifically alleged that the purchase of the private property of the plaintiffs under threat of condemnation and the subsequent contract conveying that property for the private ownership and use of Corporate 500 was unconstitutional and in violation of the rights and privileges of the plaintiffs under the taking clause of the Fifth Amendment to the Constitution of the United States and the due process clause of the Fourteenth Amendment to the Constitution of the United States. (Complaint, Appendix C, par. 28, App. p. 27) Count I of the complaint sought declaratory judgment that the contract between Cook County and Corporate 500 for the conveyance to Corporate 500 of the property obtained from plaintiffs be declared null and void, tendering the purchase price and requesting reconveyance of the land by Cook County to plaintiffs, and for other equitable relief. Count II sought to enjoin the conveyance by Cook County to Corporate 500 of the underlying fee title to the land bought from plaintiffs.

Defendants separately filed motions for summary judgment on the ground, among others, that there was no

constitutional taking because the property was conveyed by plaintiffs to Lake County by deed after agreement with Cook County on price, and no condemnation suit was filed. Plaintiffs filed a court-invited cross-motion for summary judgment on the ground that the conveyance to Lake County was a Fifth Amendment taking because it was made under threat of condemnation. The trial court allowed defendants' motion and entered final judgment for the defendants on the ground that since there was no condemnation suit filed, there was no constitutional taking, despite the fact that the land was acquired under the threat of condemnation. On the same basis, the trial court denied the cross-motion of the plaintiffs for summary judgment which contended that because of the threat of condemnation, the conveyance by plaintiffs to Cook County constituted a Fifth Amendment taking, and a subsequent conveyance of that property to Corporate 500 constituted violation of the constitutional protection that private property may be taken only for public use (C-0002-007) The Order and Memorandum Opinion of the Trial Court is attached as Appendix B. (App. p. 13)

Timely appeal was taken to the Illinois intermediate appellate court as a matter of right. The Illinois Appellate Court of the Second District recognized that plaintiffs' complaint alleged that it was constitutionally impermissible to acquire private property for a public use under threat of condemnation, and then convey it to a private party. (App. p. 6) However, the Appellate Court affirmed, holding that the taking of property in the constitutional sense is accomplished only by the filing of a petition, the ascertainment of value and the payment of just compensation. (App. p. 8) The Appellate Court held

that because no condemnation suit was filed, and the parties agreed to the amount of just compensation, the constitutional protection that the property so acquired be devoted to a public use did not inure to plaintiffs. (App. p. 11) In essence, the court held that Cook County was free to convey the property acquired from plaintiffs to defendants. (678 N.E.2d 1069) The opinion of the Appellate Court is attached as Appendix A. (App. p. 1)

After the Appellate Court denied a timely petition for rehearing, a Petition For Leave to Appeal was timely filed in the Supreme Court of Illinois. On October 1, 1997, without opinion, the Supreme Court of Illinois denied leave to appeal. A copy of that order is attached as Appendix D. (App. p. 32)

ARGUMENT

1.

IT VIOLATES THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR A STATE TO ACQUIRE PROPERTY UNDER THE RIGHT OF EMINENT DOMAIN AND THEN TO CONVEY THAT PROPERTY TO ANOTHER PRIVATE PARTY FOR PRIVATE USE.

Illinois has held that a state agency may purchase private property under threat of condemnation and then convey it to another for private purposes, in a lawsuit brought seeking to enjoin that conveyance on the ground that it is the constitutional right of the grantor of such property to have that property used only for public purposes. The courts of Illinois have decided that unless a condemnation suit is filed and pursued to judgment, the constitutional right that private property acquired by

a public body be devoted to a public use does not apply even though the property was acquired under threat of condemnation. Since a right granted under the Constitution of The United States is an essential element of plaintiff's cause of action in the case at bar, a question of federal law is involved. *City of Chicago v. International College of Surgeons,* ___ U.S. ___, ___ S. Ct. ___, Slip Opinion, No. 96-910, Dec. 15, 1997.

This issue has never been before this court to our knowledge, and thus the courts of Illinois have decided an important question of federal law that has not been, but should be settled by this Court pursuant to Rule 10(1)(c).

The takings clause of the Fifth Amendment to the Constitution to The United States reads:

> . . . Nor shall private property be **taken** for **public use** without just compensation." (emphasis supplied)

This provision recognizes the inherent governmental right to exercise the power of eminent domain, but prohibits those to whom the power has been delegated, either (1) to take private property for private use, or (2) to appropriate property without just compensation. *Nichols, Law of Eminent Domain*, 3rd Ed. Rev, Sec. 1.3.

It was the intent of the framers of the Constitution of The United States and its Amendments that the taking of one man's property by a governmental agency and then transferring it to another for his private use constitutes a form a majoritarian tyranny which may not be countenanced in a free society. *The Federalist, No. 10* at 104-09 (J. Madison) (Hamilton Ed. 1868)

Long ago this Court held that a governmental body may not exercise the right of eminent domain to take

private property for any but a public object. *Cole v. City of LaGrange*, 113 U.S. 1, 4, 5 S. Ct. 416, 418, 28 L.Ed. 896 (1885) Later, this Court rejected the contention that as long as just compensation is paid, acquisition of land by a public body and subsequent transfer to a private party was permitted. *Thompson v. Consolidated Gas Utilities Corp*, 300 U.S. 55, 80, 57 S. Ct. 364, 376, 81 L.Ed. 510 (1937)

More recently, In *Hawaii Housing Authority v. Midkiff* 467 U.S. 229, 104 S. Ct. 2321, 81 L.Ed.2d 186 (1984), Justice O'Connor, writing for a unanimous court, recognized that the Federal Constitution does not permit a state to take private property of A and transfer its ownership to B for his private use and benefit. (467 U.S. at 240, 104 S. Ct. at 2329)

States which have considered this proposition have uniformly held that a taking with a subsequent conveyance to a private party, absent some overriding social necessity, is unconstitutional. *Illinois State Toll Highway Commission v. Eden Cemetery Assn.*, 16 Ill.2d 539, 543, 158 N.E.2d 766, 768 (1959), the Illinois Supreme Court noted that in accord with the 'universally general rule,' it has consistently and repeatedly held that land may not be taken from private parties by eminent domain, and then devoted to a private use. The Supreme Court of Pennsylvania, in *Pennsylvania Mut. Life Ins. Co. v. City of Philadelphia*, 242 Pa. 47, 88 A. 904 (1913) struck down as unconstitutional legislation of the City of Philadelphia which sought to condemn land within 200 feet of a proposed parkway and convey it to a telephone company for private use after it had been impressed with a roadway easement in favor of the City. The Supreme Court of Washington, in *King County v. Theilman*, 59

Wash.2d 586, 369 P.2d 503 (1962) held that in was constitutionally impermissible for a county to attempt to condemn a road for the benefit of a neighboring land developer. The Supreme Court of Texas, in *Maher v. Lasater*, 163 Tex. 356, 354 S.W.2d 923 (1962) held that it was unconstitutional to take the land of one person for the private benefit of another.

Thus, it is clear that it is violative of the takings clause of the Fifth Amendment to the Constitution of The United States for a state, through a subsidiary public body vested with the right of eminent domain, to acquire private property by eminent domain, and then to convey that property to another private party for its private use.

2.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITS THE TRANSFER OF PRIVATE PROPERTY ACQUIRED BY A GOVERNMENTAL AGENCY FOR HIGHWAY USE UNDER THE RIGHT OF EMINENT DOMAIN TO ANOTHER PRIVATE PARTY FOR PRIVATE USE.

The Fourteenth Amendment extends the restraints of the Fifth Amendment to takings by the several states. In *Missouri Pacific Ry. Co. v. State of Nebraska ex rel. Board of Transportation*, 164 U.S. 403, 417, 17 S. Ct. 130, 135, 41 L.Ed. 489 (1896), this Court held that the taking of one man's property for private use by another is not due process of law, and violates the Fourteenth Amendment to the Constitution of The United States. From a jurisdictional standpoint, the question of whether property was taken without due process of law constitutes a 'federal question' within the meaning of Sec.

1331, Title 28, United States Code. *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462, 36 S. Ct. 402, 60 L.Ed. 743 (1916)

In *Nichols, Law of Eminent Domain,* 3rd Ed. Rev, Sec. 7.14(1), discussing the relationship of the takings clause of the Fifth and the Fourteenth Amendments to state actions, it is stated:

> "Whatever may be the precise meaning of "due process of law," there can be no question that it does not include such a gross violation of the rights of property and of the principles of constitutional government as the taking of one man's land by the state and giving it to another for his private use and benefit."

Certain types of public improvement projects which involve subsequent conveyance to a private party have been held permissible under the Fourteenth Amendment. In the seminal case of *Fallbrook Irrigation District v. Bradley,* 164 U.S. 112, 17 S. Ct. 56, 41 L.Ed. 369 (1896), this Court considered a determination of the California legislature that land needed to be taken to provide irrigation for millions of acres against the contention that the taking was for a private purpose to improve the value of privately held lands. Without the condemnation allowed by the legislation under review, it would have been impossible to carry out the proposed massive plan for irrigation of huge portions of the state. This Court held that under the circumstances there presented, the proposed takings were for a public purpose and declined to strike down the judgment of the legislature of California.

The presence of slums or blighted areas which are injurious to the public health, welfare and morals, and which meet established criteria for blight, is considered

justification for the condemnation of private property even though the property taken eventually would be transferred to private parties for redevelopment. It is the overriding social interest in the clearance of slums or the redevelopment of blighted areas which provide the justification for taking private property and later turning it over to a private interest. *Berman v. Parker,* 348 U.S. 26, 75 S. Ct. 98, 99 L.Ed. 27 (1954); *Nichols, Law of Eminent Domain,* 3rd Ed. Rev, Sec. 7.43

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321, 81 L.Ed.2d 186 (1984), this Court found such an overriding public necessity which justified the taking of private land for reconveyance to another private party. The Court found that the land oligopoly which existed in Hawaii was the kind of rational and compelling social interest which would justify the taking of private land even though it was contemplated that it would be turned over to private parties.

Nevertheless, when slum clearance efforts go beyond the blighted areas, and attempt to take private property which is not slum or blighted, for subsequent conveyance to private interests, such takings have been held unconstitutional. (See *Nichols, Law of Eminent Domain,* 3rd Ed. Rev, Sec. 743(3) pp. 7-325, and cases there cited) For example, in *Schneider v. District of Columbia*, 117 F. Supp. 705, 716 (1953) a three judge panel in the District court for the District of Columbia held that Congress did not, in adopting legislation providing for slum clearance and redevelopment, intend that property outside the slum areas could be forcibly taken and then given over to private developers.

This is not a slum clearance, redevelopment or oligarchy type case in which there is a demonstrated overrid-

ing public necessity. Nor does this record show any rational and compelling social interest that Gaples' land be transferred to Corporate 500. Nor is the contract to convey to Corporate 500 designed to address the 'health, welfare and morals' issue which justified the takings in the slum clearance and redevelopment cases. Cook County simply decided to transfer this land to Corporate 500 as a matter of financial expediency to reduce its liability to pay damage to the remainder which Corporate 500 was claiming. Corporate 500, for its part, coveted Gaples' land so it could install landscaping and bury utilities which, at least in its view, would improve the aesthetics of the entry road to its office park. These hardly rise to the level of rational and overriding social interests. On the contrary, the cases demonstrate that no mere financial expediency or the aesthetic concepts of a single individual can justify abrogation of important constitutional rights. In *In Re Opinion of the Justices,* 204 Mass. 607, 91 N.E. 405 (1910) the legislature required the opinion of the Supreme Court of Massachusetts upon the constitutionality of legislation providing for the acquisition of land for a public street in Boston which also provided for the taking of land which would be used for private warehouses and commercial buildings. The Court noted that the power to lay out a public street and take the land necessary for it is unquestioned. However the Court analyzed numerous cases from all over the country, and concluded that it was constitutionally impermissible for a governmental body to take land by eminent domain and then turn it over to private interests for commercial purposes. The justices were of the opinion that neither the development of private commerce of the city nor the incidental profit which might enure to the city out of such a procedure could constitute a public use.

So also, in *E.V. Ferrell, Jr. v. Department of Transportation*, 104 N.C.App. 42, 407 S.E.2d 601, affirmed 334 N.C. 650, 435 S.E.2d 309 (1993) the North Carolina Supreme Court considered a statute which mandated that where excess property is to be disposed of, it must first be offered to the person from whom it was acquired. The owner claimed the right to buy the property back at the original purchase price, plus statutory interest. The state wanted to sell it at a value which represented substantial appreciation because of the road it had built. In holding for the owner, the Court held that the transportation department was not in business to make a profit of its land acquisitions.[1]

The stated purpose of the transfer of the property in question to Corporate 500 to benefit the taxpayers by reducing damages that Cook County may have to pay for the taking of the land of Corporate 500, and by conferring benefits on the taxpayers by relegating the maintenance of the non-roadway land to private interests are wholly insufficient reasons for violating a landowner's constitutional rights under the Fifth Amendment. It simply is not a principle of our political system that a governmental body may do whatever it deems to be for the good of the people. It cannot be so, because a basic essential in our system is that individuals have inherent rights, and as to them the power of the Government

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[1] Illinois has a similar statute which provides that if the Illinois Department of Transportation decides that property once acquired for highway purposes is no longer needed, and the person from whom such property was acquired still owns the abutting property, the Department must first offer the land to the person from whom it was acquired at the current appraised value of the property. 605 ILCS 5/4-508(c)

is sharply limited. *Schneider v. District of Columbia*, (U.S.D.C., Dist of Col.) 117 F. Supp 705, 716 (1953)

We suggest that it must be concluded that this case also violates the Fourteenth Amendment to the Constitution of the United States.

3.

WHERE PRIVATE PROPERTY IS ACQUIRED BY A GOVERNMENTAL BODY UNDER THREAT OF CONDEMNATION, A CONDEMNATION LAWSUIT TO JUDGMENT IS NOT NECESSARY TO INVOKE THE RULE THAT THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES PROHIBIT THE TAKING OF PRIVATE PROPERTY FROM ONE PERSON AND SUBSEQUENT CONVEYANCE TO ANOTHER PERSON FOR PRIVATE USE.

The core question presented by this case is whether the constitutional protection that private property taken under the power of eminent domain may be used only for public purposes applies when the taking is by purchase under threat of condemnation or applies only if the land is acquired through a judicial process. To determine whether a lawsuit is required to invoke Fifth and Fourteenth Amendment protections, it is appropriate to look to federal law, Illinois precedent, decisions from other states, logic and public policy.

As we have previously declared, our research has disclosed no federal case directly upon this question. As to state case law, we first review briefly the cases upon which the Illinois Appellate Court rested its decision. The main case relied upon by the Illinois Appellate Court was *Patrick Media Group v. DuPage Water Commission* 258 Ill.App.3d 1068, 1077, 630 N.E.2d 958, 196 Ill.Dec.

793 (1st Dist., 1994). There, a compensation claim was made by a sign company for loss of its signs upon certain railroad property which had been purchased by the Water Commission. The signs were present by virtue of a lease terminable by either party upon thirty days notice, and preexisted the purchase. The Water Commission took title to the property by deed subject to this lease. In Illinois, a public body is not permitted to condemn the property of a public utility, including a railroad, without petition, hearing and order of the Illinois Commerce Commission. *Department of Conservation v. Chicago & Northwestern Transportation Co.*, 59 Ill.App. 3d 89, 375 N.E. 168, 16 Ill.Dec. 537 (1978) The Water Commission had no authority to condemn the property owned by the railroad, since the record does not show that it had obtained the necessary permission. There was no ordinance of acquisition, no appraisal, no platting, and no pre-condemnation procedure, and the attorney for the public body testified that condemnation was never considered. The acquisition by the Water Commission acquisition was thus a completely arm's length purchase by a public body with no power to condemn and accompanied no threat of condemnation whatever. That case also did not involve any attempt by the Water Commission to convey the property purchased from the railroad to a third party for private use, so appears to be of no precedential value to the issue presented by this case.

The Illinois court also relied upon *Mills v. Forest Preserve District*, 345 Ill. 503, 178 N.E. 126 (1931), where Mills, the property owner, agreed to sell swamp land to the Forest Preserve District under threat of condemnation. Later, when the Forest Preserve District was held not to have the power to acquire swamp land, and the

land had been drained and rendered more valuable, Mills brought suit to undo his bargain and get his property back. The sole issue was the right of the Forest Preserve District to take his land in the first place in light of the fact that it was later determined that it did not have the statutory power to take swamp land. There was no issue of any attempt by the Forest Preserve District to convey Mills' land to another, and no issue of whether he was paid just compensation when his land was purchased. Thus there was no issue of whether the constitutional protection of the takings clause of the Fifth Amendment applied.

The third case relied on by the Illinois Appellate Court was *Mattion v. Board of School Trustees of Township 41*, 2 Ill.App.3d 1035, 279 N.E.2d 66 (1971) where a condemnation suit to acquire property for future school needs was filed, and then settled during the pendency of the lawsuit before trial. The suit was dismissed and a deed was taken. Five years later, the taking school board decided that the land was surplus and not needed, and proposed to place the property for market sale. The owner sought to rescind the conveyance and get back his land based on a contract theory, based on a contention that he was coerced into selling his property. No constitutional issues were raised. The Mattion court held, incredibly, that because the condemnation lawsuit was settled, the property was not acquired through eminent domain proceedings, and thus the owner was not coerced!

From a purely stare decisis point of view, the cases relied upon by the Second District of the Illinois Appellate Court in this case are simply inapposite. But even if our distinction of these cases is unpersuasive, then it means that Illinois law is wrong, and that is why we

seek review here. If it is the law of Illinois, expressed by these cases together with the case at bar, that it takes a condemnation suit prosecuted to judgment to invoke the protections of the Fifth Amendment to the Constitution of the United States that private property will not be taken for private use, then that is wrong law and must be corrected by this Court.

We then turn to cases from other states. Since it seems so apparent that the Constitution prohibits a public body from disposing of land for a private use after acquiring it for public use, except under certain statutory schemes under compelling social interests previously described, we do not find it surprising that our search for instructive cases from other states has revealed only two cases on point, cases which the Illinois court has rejected without reason. In *Concrete Service Company v. State of California ex rel. Department of Public Works*, 274 Cal. App.2d 142, 78 Cal.Rptr. 923 (1969) land was acquired by a state agency for a freeway after a resolution of necessity, authorization to condemn, appraisal and negotiation, but without a condemnation suit. The owner of a concrete batch plant located on the property was a month-to-month tenant, and when notified of the termination of its tenancy by the state agency, filed an inverse condemnation suit for compensation. It was conceded that if an eminent domain action had been started, Concrete Service would have been entitled to compensation for the taking of its batch plant. The California Court of Appeals held that even though no suit was filed, the threat of condemnation and the method used in obtaining the property constituted the substantial equivalent of condemnation, and remanded for a determination of the compensation due to Concrete Services.

Later, in *Lanning v. City of Monterey*, 181 Cal.App.3d 352, 226 Cal.Rptr. 258 (1986) a land company sold certain land to the City of Monterey in lieu of the exercise of the city's power of eminent domain. A tenant on the land claimed just compensation for his leasehold interest, to which he would be entitled if the land were taken by eminent domain, but the City claimed that because it purchased the property without threat of eminent domain, it was not liable for compensation to the tenant. Since the trial court found that the sale was in fact motivated by a threat of condemnation, and since the evidence supported that finding, the Court of Appeals held that even though no condemnation suit was filed, the property was acquired by the City in the exercise of its power of eminent domain under the Fifth Amendment, and the tenant was entitled to compensation.

Having seen that Illinois stands alone in its view that is it necessary that a condemnation suit be filed and prosecuted to judgment in order to invoke the protections of the Fifth and Fourteenth Amendments, we now look to whether that view can be supported either by public policy or by simple logic.

The Illinois court saw a distinction in a purchase which was not an adversarial proceeding and the adversarial process of a condemnation suit prosecuted to judgment. It apparently felt that even if a condemnation suit were filed, but subsequently settled at some point prior to judgment, that process was not adversarial because it was ultimately settled.

This distinction is not logically supportable. The landowner's constitutional rights attach because of his ownership of the land. They do not arise because some public

body wants it. Thus, the only way the Illinois decision can be justified by logic is if it could be said that by settling with a governmental body in lieu of threatened condemnation, or during a condemnation lawsuit, an owner somehow waives his constitutional right that his land may not be wrested from him by a public body under threat of condemnation and then given over to his neighbor. Of course, it is elemental that there can be no waiver of a constitutional right without the specific knowledge of the party waiving the right that a waiver of the right is intended. *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 566 (1972) Where an owner agrees to compensation, it is easy to conclude that he has thereby agreed that his constitutional right to just compensation is satisfied. But when he settles, either presuit or during suit, it is in implied reliance on the premise that his property will be used only for the public purpose for which it was acquired. *Nichols, Law of Eminent Domain,* 3rd Ed. Rev, Sec. 7.01(4). Here, in conformity with the universal practice, there was no specific waiver by Gaples of his right to have the property taken owned and used by the County. His refusal to sell to his neighbor, his concern for free and unfettered right to public utilities, and the importance to him and his business of not having the view of his building obscured by landscaping installed by his neighbor to enhance the ambiance his entry road certainly would have led Gaples to have absolutely refused to sell to Cook County if he had the slightest inkling that his land would be somehow given over to his neighbor. Illinois law did not say that it required a condemnation suit prosecuted to judgment to protect his right to have his property not later conveyed to his neighbor, and so

neither he nor his lawyer could have known it. But if Gaples possibly could have known that it took a condemnation suit to judgment to protect that right, his long resistance to sale to Cook County, his position with regard to the necessity of the access road, the real value to him and his business of having ownership of the land in a neutral public agency, and his willingness, as demonstrated by this litigation to finance whatever the cost is to do that, leads to the inescapable conclusion that he would have demanded that the acquisition by Cook County be prosecuted to judgment order.

It is wholly specious to suggest that Gaples relationship with Cook County was anything but adversarial. Gaples howled and protested for over three years, refusing to allow the property even to be surveyed, calling the police to eject the surveyors, turning down numerous offers to buy, and finally relenting and consenting to sale only because he did not want to be involved in a condemnation suit. Gaples testified that he never would have sold his property to Cook County but for its threat that it was going to take it by condemnation anyway. (C-805-807) This is stark evidence of an adversarial relationship that did not suddenly turn to the kind of free though wary relationship between a buyer and seller negotiating in the open marketplace.

The position of the Illinois Courts is contrary to public policy because it reflects failure to look to the future for the consequences of its ruling. If it be the law that anyone who settles with a condemnor before the filing of a condemnation suit, or even during prosecution of such a lawsuit, is at risk of having the land which he sells to the public body conveyed to whomever the political winds dictate should have ownership of the property, few would

settle. Such a concept is foreign to the universal pubic policy of encouraging settlement rather than litigation. *Williams v. First National Bank,* 216 U.S. 582, 30 S. Ct. 441, 54 L.Ed. 625 (1910) This is the public policy mandated by the Illinois legislature whose eminent domain authorization statute provides that a condemnation suit may be filed only when compensation cannot be agreed upon. (735 ILCS 5/7-102)

From another public policy standpoint, if it be the law that if a landowner decides to settle price and sell his property under threat of condemnation his property then can be sold to others for private use, there is nothing to prevent a governmental agency with threatening condemnation on a pretextual public use. Then, after coercing the owner to part with his or her property by the threat of condemnation, to convey the property to a politically favored developer, for a profit to a purchaser who will give them more than what they paid for the land, to a political crony who plans to sell it at a profit after the public project increases its value, or simply to a generous campaign donor. Not only is such a concept simply contrary to public policy, we respectfully submit that nothing could do more violence to our Constitution.

4.

THE THREAT OF CONDEMNATION OF PRIVATE PROPERTY FOR PUBLIC USE BY A GOVERNMENTAL BODY COUPLED WITH A DEED CONVEYING TITLE INVOKES THE PROSCRIPTION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES THAT PRIVATE PROPERTY MAY BE TAKEN ONLY FOR PUBLIC USE.

What is constitutionally proscribed is the conveyance of land which is wrested from someone without their

consent. In the normal real estate transaction, a buyer approaches a landowner, and offers to buy his property. Or, a landowner wishing to sell advertises his property for sale. Or, a broker, knowing one wants to buy and the other is inclined to sell puts the two parties together. If the buyer and seller agree on terms, conditions and price, a contract is signed and ultimately a conveyance follows. Throughout all of this, however wary and cautious the parties, no matter how involved the contract negotiations may get, there is no measure of compulsion. Our law admits of absolute freedom in the buying and selling of property, and no person may compel another to either buy or sell if the other person is not so inclined. Before contract, buyer or seller is free to leave the negotiating table at any time.

It is essentially different where public bodies with the power of condemnation are the buyers. There, the very existence of that power coupled with the need of the public body to acquire a certain parcels of land in a certain location for a certain use, implies an element of bi-partisan compulsion from the beginning. When a public project is announced, or a landowner is approached by a public body and advised that his land is needed for a particular public purpose, the threat of the ultimate use of that power becomes a compelling force, even if no threat is articulated. When the public body goes to the extent of adopting legislation providing for the filing of an eminent domain action if the owner does not agree to price, the screw tightens. Having property surveyed, appraised, and engineered, and the sending letters of offer, and negotiators complete the show of force which leads a landowner to the conclusion that it is inexorable that his land will be taken, and since the only question is how

much, he better get on with an agreement for price. This is the kind of compulsion that does not exist in a regular land purchase transaction.

Fear of the threatened condemnation suit is the key element in driving a landowner to accede to the demands of a public body that he sell it his land. From the experience of all lawyers and judges, it may safely be said that most people wish to avoid litigation, in whatever setting. In eminent domain matters, there are specific reasons why most people would want to avoid litigation, and the primary reason is that the cost of that litigation to the owner would rob him of a large part of the compensation he is to receive for his land. The expense of hiring an attorney, the fees of appraisers, engineers, land planners and brokers, the cost of exhibits and court reporters, and other costs will so eat into the compensation received, lead to a landowner's perception that it is better to settle at a lower price and be time and money ahead. It is that perception which is a prime consideration for such sale.

The cost involved by the mere delay in the prosecution of the action is another serious factor forcing people to sell. As Chief Justice Taft wrote in *Brown v. United States*, 263 U.S. 78, 86 44 S. Ct. 92, 95, 68 L.Ed. 171 (1923):

> "It often happens that in the delays incident to condemnation suits the loss to the owner arising from the delay between the summons and the vesting of title by judgment is a serious one."

These factors lead to the conclusion that the essential element of compulsion may be implied in any purchase by a public body with the power of condemnation even if no condemnation suit is filed. Once condemnation is overtly threatened, legislation is adopted, surveys and

plats are made, the agency has the property appraised, or a formal offer is made, the threat is no longer implied, but very real. After the suit is filed, the threat has resolved into reality, and the specter of increased costs and loss through delay is real. As discovery proceeds, the landowner is repeatedly confronted with the necessity of making a choice whether to settle or proceed to trial and judgment. During trial, if it gets that far, the presentation of the evidence may lead to the conclusion that it is expedient to settle. Through all of this, there is the element of compulsion that differs condemnation from an ordinary real estate transaction. And it is that element of compulsion that invokes the protection of the Fifth Amendment, not any procedural step in the process. Thus, it is acquisition of property under threat of condemnation, not the prosecution of a condemnation suit to judgment, that invokes the protection of the Fifth Amendment.

This conclusion is not eroded by the principle that the mere passage of legislation, threat of condemnation or even the filing of a condemnation suit does not constitute a taking. (*Nichols, Law of Eminent Domain,* 3rd Ed. Rev, Sec. 6.06) In such cases, there cannot be a taking because the owner is not thereby deprived of ownership. Without physical appropriation or taking, or without title passing by deed or judgment order, there is no taking at all. But that is not this case. In the context of this case, it is the threat of condemnation coupled with the taking of title by deed that clearly produces a Fifth Amendment taking.

This case is important to all individual property owners who hold their land subject to the right of government to appropriate it for public purposes, and look to

the Fifth Amendment for basic protection. Broadly, Justice Burton noted in *United States v. Carmack,* 329 U.S. 230, 236-237, 67 S. Ct. 252, 255, 91 L.Ed. 209 (1946) that the Fifth amendment provides a property owner with important protection against the abuse of the power of eminent domain.

Just as this Court voices its concern for the chilling effect of the slightest First Amendment infringement, so also should it listen to the cry of the individual property owner who is the victim of governmental over-reaching in Fifth Amendment taking matters. If the Illinois decision is left to stand, then there is nothing to stop political taking of property for profit or the subsequent conveyance to favored cronies, or taking simply for profit. To do so would put public bodies in the real estate business with a decided advantage over market buyers.

The effect on land acquisition procedures by well-intentioned public bodies will also be mightily affected. Although it has generally been understood that property cannot be taken from one person and then given or sold to another, under the Illinois decision, all owners now will have to be advised to demand a condemnation suit, for if they settle, their land then can be sold or given to another. No lawyer, under pain of mortal malpractice, could recommend settlement of a proposed taking without a formal condemnation suit which proceeds all the way to judgment order, except possibly by explicit written waivers by his client, executed after full disclosure. Where owners are explicitly told that after they settle with the condemnor, their land may be sold to someone else, it is inescapable that many more owners will opt for condemnation suits to judgment, even if they do agree on price. The resultant financial drain on public bodies

which will have to finance all this litigation, especially highway departments engaged in multiple takings, will be staggering. The effect on already overloaded court dockets is equally daunting.

CONCLUSION

Review should be granted in this case because the issue presented is an important constitutional question not yet decided squarely by this Court. The decision of the state court of Illinois is in conflict with logic, public policy and the decisions of other states, and should not be allowed to become the springboard for erosion of the important constitutional right of every landowner whose property is acquired by a public body for public purposes that his property actually be devoted to those purposes.

There are leagues and lobbies for highway departments, open space districts, parks and forest districts, municipal and county governments and districts, and other agencies engaged in the acquisition of land for public purposes. But there is no league or lobby to speak up for the rights of the individual property owner. Few owners who may suffer their land to be taken from them and then delivered to another have the financial resources to prosecute their claim of deprivation of their constitutional rights through the state court systems, much less to this Court. It is for this Court to hear the voice of the individual, for if that voice is not heard, then the voice of freedom is stilled, and we are a step closer to majoritarian tyranny.

Justice and the public interest demand that there be clear and unmistakable pronouncement by this Court that the taking of private property for public use, even

if by deed rather than condemnation suit, if done under threat of condemnation, is a Fifth Amendment taking which entitles the property seller to the constitutional guarantee that his property will be used only for a public purpose, and will not be sold or given to another for private use.

Respectfully submitted,

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